Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JUNE 14, 2006

No.

JUAN A. GIRALDO
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT

FOR THE FIRST CIRCUIT

PETITIONER BRIEF

Prepared by:

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STATEMENT OF ISSUE

Petitioner, Juan A. Giraldo, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court Appeals for the First Circuit, entered on March 17, 2006 (No. 05-2192).

THE FUNDAMENTAL QUESTION HERE IS IF THE SIXTH AMENDMENT RIGHTS OF THE PETITIONER ARE BEING VIOLATED OR NOT. HIS SENTENCE HAS BEEN ENHANCED BASED ON FACTS NOT FOUND BY A JURY OR ADMITTED BY THE DEFENDANT (TWO LEVEL INCREASE FOR A LEADERSHIP ROLE)

The Judgment of the United States Court of Appeals for the First Circuit, on March 17, 2006 which affirms the sentence imposed by the District Court of Providence, Rhode Island (The Honorable William E. Smith – 04 CR 74-01 S), is attached hereto as Appendix "A". A copy of the Governments Motion for Summary Disposition (Basis of the Court of Appeals decision), dated March 09, 2006, is attached hereto as Appendix "B.

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U.S.S.G. Manuel, Introduction and General Application Principles 1, 3

STATEMENT OF JURISDICTION

Jurisdiction is conferred by 18 USC §1254.

STATEMENT OF FACTS

The petitioner was born in Pereira Colombia in 1965. He attended high school and the University where he completed a four year program in engineering studies. In 1987 he immigrated to the United States, and ultimately formed the Interpreter Services Corporation. In this capacity he worked over the years with various attorneys in the Rhode Island area including John and Joseph Bevilacqua and John F. Cicilline.

The petitioner has five siblings including his sister Clara Vasquez who was a co-defendant in his case.

In order to fully understand this case, this Court needs to begin its analysis by understanding that Juan Giraldo and his sister were as close to one another as any siblings could be. Everyday before work, the petitioner visited with his sister for morning coffee. Dinnertime was often spent together and their lives were intertwined in several other significant aspects.

Beginning in late 2003, Clara Vasquez told her brother Juan that her husband was interested in purchasing a kilogram of cocaine. During the first series of inquires Juan attempted to dissuade his sister and her husband from the venture. In fact, on two separate occasions Juan gave his sister money so that it would not be necessary for his sister and her husband to deal in cocaine to meet the monthly bills.

In early 2004, Juan's sister and her husband continued their efforts to get Juan to secure a kilogram of cocaine. By late February, the petitioner acquiesced and the husband began recording conversations. In a March 4th conversation the husband (Alberto Vasquez) and Juan discussed the price of a kilogram of cocaine which had been set by a third party seller. The husband offered during the same conversation, to introduce Juan to the person that Alberto would be selling to. This, presumably would have been an agent who was Alberto's controller at the time. Juan, however demurred, pointing out that it would be dangerous.

On March 7th, there was another conversation between Juan and Alberto and on this occasion there was discussion about the purchase of two kilograms at the price set by the third party seller for $23,000.00 per kilogram and their re-sale at $24,000.00 per kilogram. During the course of this intercepted conversation it was clear that Alberto, and not Juan, would make a $2,000.00 profit from the sale. Juan clearly said, "Yeah, you'll make $2,000.00."

On March 13, 2004 Alberto told the agents that Juan told him that he would be going to New York to arrange for the shipment of the cocaine that Alberto wanted.

On March 14th, Juan and a cousin went to Alberto's home early in the .- When Alberto returned to his home his wife gave him one kilo of co-ne. Alberto later called Juan to discuss payment and Juan refused to speak h him.

During the following 8 to 10 weeks Alberto attempted to get Juan to ply cocaine approximately twenty times, but Juan refused.

The petitioner -appellant was charged with conspiracy to possess with nt to distribute cocaine, [21 USC 841 (a) (1) and (b) (1) (B) and 846], and session with intent to distribute cocaine. [21 USC 841 9 (a) (1) and (b) (1)]. The indictment contained a leadership allegation but the petitioner never aded to that nor did he make any leadership admission. The defendant-ellant was sentenced at the top of the guideline to a term of 71 months.

SUMMARY OF ARGUMENT

The petitioner-appellants base offense level was 26. Two points were added under U.S.S.G. 3B1.1(c) for a leadership role. Level 28 was then

reduced to level 25 because he was accorded a three point reduction for acceptance of responsibility. On July 29, 2005 the petitioner was sentenced to a term of imprisonment of 71 months and ordered to pay a fine of $10,000.00.

The petitioner-appellant contends that the two point increase under 3B1.1 (c) was improper, because his conduct in this case does not evince any leadership role.

ARGUMENT AND LAW

The guidelines were adopted to enhance the ability of the criminal justice system to reduce crime through an effective fair sentencing system; and to provide uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. U.S.S.G. Manuel, Introduction and General Application Principles, 1A1.1; Mistretta v. United States, 488 US 361 (1989); United States v. Snyder, 136 F.3d 65 (1st Cir. 1998); United States v. Labonte, 70 F.3d 1396 (1st Cir. 1995).

The guidelines, however, were not intended to discontinue the courts historical practice of considering the relevant circumstances of the defendant's real conduct whether those circumstances were specifically charged or not. United Sates v. Lombard, 72 F.3d 170 (1st Cir. 1995); United States v. Jackson, 3 F.3d 506 (1st Cir. 1993); see generally, Stephen Breyer, The Federal Sentencing

Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).

As now Justice Breyer noted, the Guidelines evince a compromise between a pure "charge offense" system in which sentences are determined based solely upon conduct of which a defendant is convicted, and a "real offense" system in which sentences are fashioned in view of all relevant mitigating and aggravating factors surrounding the defendants conduct. id; United States v. Lombard, supra.

In the process of achieving that objective the primary goals of "certainty, uniformity and fairness" maintain their position as essential ingredients of the sentencing process. United States v. Unger, 915 F.2d 759 (1st Cir. 1990); cert denied, 498 US 1104 (1991); United States v. Mocciola, 891 F.2d 13 (1st 1989). In this case the addition of two points for a leadership role offends the intent of the guideline and results in sentence disparity.

The determination of a defendants role in an offense is heavily dependent on the facts of the particular case and as

such is subject to review under the clearly erroneous standard. United States v. McLean, 409 F.3d 492 (1st Cir. 2005); United States v. May, 343 F.3d 1 (1st Cir. 2003); United States v. Funtes-Moreno, 895 F.2d 24 (1st Cir. 1990); United States v. Wright, 873 F.2d 437 (1st Cir. 1989). The role determination requires the District Court to draw inferences from a variety of data including information in the pre-sentence report and the defendants statements and demeanor at the sentencing hearing. United States v. Herrera, 878 F.2d 997 (7th Cir. 1989); United States v. Mejica-Orosco, 867 F.2d 216 (5th Cir. 1990). It is a mixed fact-law question. United States v. Joyce, 70 F.3d 679 (1st Cir. 1995); United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989).

The guidelines themselves do not specifically define "organizer, leader, manager or supervisor," but the commentary to the guidelines provides some basis for discerning when an upward adjustment for an aggravated role under 3B1.1 (c) is appropriate. United States v. Ventura, 353

F.3d 84 (1st Cir. 2003); United States v. Tejeda-Beltran, 50 F3d 105 (1st Cir. 1995); United States v. Fuller, 897 F.2d 1217 (1st Cir. 1990).

First, the comments clearly indicate that section 3B1.1 is intended to apply only to criminal activity engaged in by more that one participant. United States v. Morrero-Ortiz, 160 F.3d 768 (1st Cir. 1998). United States v. Abitoye, 923 F.2d 221 (1st Cir. 1991). Second, the evidence must show that the defendant exercised control over or was otherwise responsible for organizing the activities of other individuals in committing the crime. United States v. Laboy, 351 F.3d 578 (1st Cir. 2003); United States v. Lopez-Lopez, 295 F.3d 165 (1st Cir. 2002); United States v. Veilleux, 949 F.2d 522 (1st Cir. 1991). The enhancement requires some degree of control or organizational authority over others. United States v. Cali, 87 F.3d 571 (1st Cir. 1996); United States v. Fuller, 897 F.2d 1217 (1st Cir. 1990). Managerial status generally attaches if there is evidence that the defendant, in committing the crime, exercised control over or

was otherwise responsible for overseeing the activities of others. United States v. Webster, 54 F.3d 1 (1st Cir. 1995); United States v. Munoz, 36 F.3d 1229 (1st Cir. 1994); United States v. Savoie, 985 F.2d 612 (1st Cir. 1993).

The Court may draw on all relevant conduct when determining whether the defendant was an organizer or leader for the purposes of the guidelines. United States v. Laboy, supra; United States v. Ruiz-Batista, 956 F.2d 351 (1st Cir. 1992). It may also consider the exercise of decision making authority, the nature of his participation in the commission of the offense, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the alleged activity and the degree of control and authority exercised over others. U.S.S.G. 3B1.1 cmt. (N4); United States v. May, supra; United States v. Soto Beniquez, 356 F.3d 1 (1st Cir. 2003); United States v. Conley, 156 F.3d 78 (1st Cir. 1998); United States v. Graciani, 61 F3d 70 (1st Cir. 1990).

In United States v. McLean, 409 F.3d 492 (1st Cir. 2005) the Court upheld the assignment of a three level enhancement to Navarro because he was the local supervisor of all the conspirators in the state of Maine. The evidence showed that Navarro managed the assets of the conspiracy, controlled the local participants and re-supplied the local participants. Id 496.

In United States v. May, 343 F.3d 1 (1st Cir. 2003) the defendant conceded that he was a key player and a manager but argued that he had a middleman role that prohibited a four level enhancement. The trial court found that he was deserving of four points, and this Court approved because he and Barbour instigated the conspiracy; and because he recruited participants, received payments, divided the proceeds and took over the organization when Barbour was arrested.

In United States v. Laboy, 351 F.3d 578 (1st Cir. 2003) the court gave the defendant a four point upward adjustment because Laboy attended gang meetings and was

identified as a leader. Lower level gang members were directed to take their problems to Laboy, and he had several gang members selling drugs on his behalf.

In United States v. Picanso, 333 F.3d 21 (1st Cir. 2003) the defendant was given a four point leadership enhancement as an organizer because he coordinated others and was responsible as a wholesaler of bulk amounts of cocaine.

In each of those cases the court found core facts to support the enhancement. It was not a matter of intuition or speculation. Similarly, a court that assigns a two point increase must ground its decision on facts that demonstrate that the defendant was an organizer, leader manager or supervisor in any criminal activity. United States v. Soto Beniguez, 356 F.3d 1 (1st Cir. 2003).

In United States v. Stein, 233 F.3d 6 (1st Cir. 2000) the defendant was given a two point enhancement for his role in the offense. This Court, approved the two point enhancement because Stein devised and carried out a plan to

conceal the Wellfleet property, and met with the bankruptcy attorney for the purpose of providing information. He also attended the meeting of the creditors. The court found that Stein exercised continuing decision making authority, paid and authorized the payment of bills, and therefore was a manager or supervisor.

In United States v. Nelson Rodriguez, 319 F.3d 12 (1st Cir. 2002) the defendant was given a three level increase for being a manager or supervisor in criminal activity that involved five or more participants. The court agreed that he was a manager or supervisor because he controlled all of the beaches where drugs were imported and the group from Humicao, in the drug distribution efforts.

In United States v. Conley, 156 F.3d 78 (1st Cir. 1998) the court approved the assignment of managerial points because the defendant supplied addresses to San Diego sellers, recruited others as receivers for the falsely addressed packages and supervised their efforts.

In United States v. Kneeland, 148 F.3d 6 (1st Cir. 1998) the court approved a leadership enhancement because the defendant formed the company, rented office space for its operations and invited associates to join him in the fraudulent advance scheme.

In United States v. Berrios, 132 F.3d 834 (1st Cir. 1998) this court approved organizer or leadership points for a defendant who was always the person contacted when the heroin was to be purchased. He also set prices and determined the location of the transactions and was the person who hired the person to run the heroin store.

In United States v. Fosker, 124 F.3d 52 (1st Cir. 1997) the Court held that a defendant who assisted in devising the scheme, and who targeted the victims home was a leader of criminal activity. This defendant also provided the home in which the planning meeting took place and gave advise on whether weapons should be used.

In United States v. Cruz, 120 F.3d 1 (1st Cir. 1997) (en banc) the Court upheld the organizer-leadership

enhancement for a defendant who was at the center of a series of well organized drug and weapon sales. The defendant also involved various individuals as facilitators and as go betweens in an effort to limit his own involvement.

In United States v. Goldberg, 105 F.3d 770 (1st Cir. 1997) the court approved a management enhancement because the defendant managed the parts of the scheme involving false payroll and false documentation.

In United States v. Voccola, 99 F.3d 37 (1st Cir. 1996) the court approved the defendants managerial role because he was the owner of the body shop and directed his sister in law on how to handle the details of the insurance fraud.

These cases all support the notion that a managerial or leadership role envisions something more that a neutral relationship between parties who are each performing tasks to make the artifice work. There needs to be supervision of others, United States v. Mitchell, 85 F.3d 800 (1st Cir. 1996); United States v. Belardo-Quinones, 71 F.3d 941 (1st Cir. 1995); or extensive involvement in the planning or execution

stages of the crime. United States v. Camuti, 78 F.3d 738 (1st Cir. 1996); United States v. Twitty, 72 F.3d 228 (1st. Cir. 1995).

It is also proper to impose these enhancements where the defendant recruits others into the enterprise. United States v. Webster, 54 F.3d 1 (1st Cir. 1995); United States v. Conley, 156 F.3d 78 (1st Cir. 1998). All of these findings, however, must be rooted in the evidence and may not be based on a judges' hunch. United States v. Ortiz, 966 F.2d 707 (1st Cir. 1992). It is not sufficient if the parties are equals, United States v. Di Santo, 86 F.3d 1238 (1st Cir. 1996) or if the defendant worked with the leader and even performed duties which assessed the organizations risk of loss. United States v. Cali, 87 F.3d 571 (1st Cir. 1996).

In United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996) the court rejected a supervisory enhancement which was assigned because the defendant had greater experience than others in the artifice. The decision made it plain, that

where the activity was not otherwise extensive the defendant must have exercised direct control over other participants.

In United States v. Sostre, 967 F.3d 728 (1st Cir. 1992) the defendant contacted the source and escorted the purchasers to the room where the transaction took place. The evidence did not establish that he had a supervisory role over anyone, except his brother who served as a lookout. This court reversed a supervisory enhancement.

In United States v. Castellone, 985 F.2d 21 (1st Cir. 1993) the defendant determined who purchased the drugs and where the sales would take place. He also set the prices and determined his profit. This court reversed a managerial enhancement because these facts apply to every person who is a street level drug distributor.

The court in Castellone was obviously looking for some fact or combination of facts that would give the defendant a role as manager or supervisor. Merely, because he set the prices or decided when and with whom he would

deal was not by itself sufficient. The key is that the defendant must have others over whom he exercises control.

The Probation Department recommended the two point increase in the case against Giraldo because:

> It was Mr. Giraldo who had the numerous conversations with the cooperating witness and who negotiated the price per kilogram of cocaine. He was the decision maker in that he dictated how and when the deal would take place.

The court overruled the defendant-appellants objection to the two point leadership adjustment and said:

> As I indicated by my questions, I recognize the fact that Mr. Giraldo did not go into it for his own personal profit but rather as a favor to someone close to him. Nevertheless, once he

> was persuaded to do it, he was the conductor of the crime. He made the decisions. He effectively set the price. He called the shots. He was directing the other participants in the transaction. He was clearly the most concerned about the counter-surveillance and made decisions with respect to how to respond to that surveillance.

The Probation Department's assessment is disingenuous at best. First off, it counts little that the defendant and the cooperating witness had numerous conversations. What is important is what those conversations were about.

Mr. Giraldo did not negotiate any price. He simply told his brother in law that a kilo of cocaine cost $23,000.00 and that if he sold two of them for $24,000.00 he would earn $2,000.00.

The courts conclusion was also unsupported by the evidence in the case. He was the "conductor of the crime" like any other person who involved himself in a drug deal. He did not direct his sister or anyone else in the effort, and the only decision he made was to submit to the endless entreaties of his brother in law and his sister.

They were the ones who needed the extra money and they were the ones who set things in motion. He did not call the shots and he did not set the price. In fact he is no more that a passive facilitator.

The District Court said he "effectively set the price". What in fact happened is contained in a March 4th intercepted conversation. The CW asked what the price of a kilogram of cocaine was and was it selling for $22,500.00. The defendant said no, it's selling for $23,000.00.

On March 7th the defendant-appellant told the CW that he could get two kilograms for him at $23,000.00 per kilogram. The CW told the defendant-appellant he would sell them for $24,000.00 and the defendant-appellant told the

CW, that he, the CW, would make $2,000.00. The defendant-appellant not only would make nothing, but it was the CW who set the price at $24,000.00. The defendant-appellants' only role regarding the price was to tell the CW that the price he would be paying was $23,000.00.

On March 13th the defendant-appellant told the CW he was going to New York to get the cocaine. He presumably did that at the direction of the CW because the defendant-appellant was not making a profit and would not have gone to New York if he had not been asked to do so by the CW.

On March 14th the defendant-appellant was seen at the home of his sister in the presence of Louis Giraldo. Clara Vasquez told the CW that Louis Giraldo had dropped the kilogram off at the house. The facts also establish that the money for the purchase was furnished by the CW. That was part of the plan which the CW devised.

On March 16th the CW reported that the defendant-appellant had expressed concern about a Mercedes he had

seen on the previous day. He advised the CW that he had checked the plate and was told that the plate belonged to the FBI. The government admitted that it had no evidence that such a check had taken place.

On June 27th the defendant had another conversation about the Mercedes and a green Audi with tinted windows.

The court placed emphasis on the defendant-appellants concern about surveillance. Initially, it would appear that such concern is more characteristic of a first time offender than it would be of a seasoned law breaker. But more importantly it is not one of the signposts established by the commentary to 3B1.1(c). Being concerned about apprehension does not portray control over others or the organization of activities. There must be some showing the defendant-appellant directed a courier, or showed someone how to divide up or package cocaine, United States v. Jadusingh, 12 F.3d 1162 (1st Cir. 1994) or that he recruited others. United States v. Talladino, 38 F.3d 1255 (1st Cir. 1994). In this case all of that activity was conducted by the

CW, and the defendant-appellant did no more then follow the suggestions of the CW. It was the CW who was responsible for organizing the transaction. The defendant-appellant did no more than follow his directive by securing the cocaine.

The history of this section of the guidelines establishes that these enhancements were created because of concerns about relative responsibility. Persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public. The Sentencing Commission's intent, therefore, was to provide added punishment for people who fall into that category. It was not the Commission's intention to punish people, with additional jail time simply because they puffed smoke.

The Seventh Circuit specifically rejected an adjustment under this section where there was insufficient evidence that the defendant had any greater responsibility for the drug operation than anyone else who was involved in the offence. United States v. Vargas, 16 F.3d 155 (7th Cir. 1994).

See also United States v. Fermin, 32 F.3d 674 (2nd Cir. 1994). The defendant must occupy one of the roles in the enhancement guideline as an organizer, leader, manager or supervisor because it is not enough that he may have been more culpable then the others, United States v. Harper, 32 F.3d 1387 (9th Cir. 1994) or because the pre-sentence report has portrayed him as a leader. United States v. Catano, 65 F.3d 219 (1st Cir. 1995).

If there was a leader or organizer in this case it was the cooperating witness and no one else. He is the one who formulated the plan, he is the one who decided when and under what circumstances the transaction would occur and he is the one who directed and controlled the others in the plot. He is also the one who would have received the only profit.

It is not enough for the Court to say the things it did without citing some factual basis for its findings. A conclusion like this is no more than a hunch. United States v. Ortiz, 966 F.2d 707 (1st Cir. 1992).

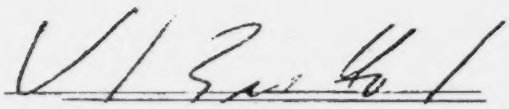
CONCLUSION

Based upon the foregoing points, facts, arguments and authorities, the Petitioner respectfully request this Honorable Supreme Court grant the within writ and reverse the Judgment of the United States Court of Appeals for the First Circuit.

Respectfully Submitted,

Juan A. Giraldo,

By his Attorney,



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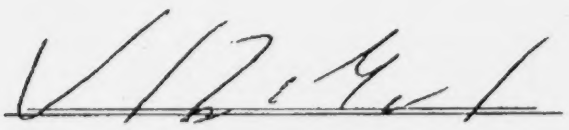
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a) (7) (C), I, Victor J. Beretta, certify that the word processing system of my office has determined that this document (excluding the table of contents, the table of authorities, the certificate of compliance, the appendixes and the certificate of service) contains 3,981 words.



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